

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

January 3, 2006

IN RE:

PETITION TO REQUIRE ATMOS ENERGY
CORPORATION TO APPEAR AND SHOW CAUSE
THAT ITS RATES ARE JUST AND REASONABLE
AND THAT IT IS NOT OVEREARNING AND IN
VIOLATION OF TENNESSEE LAW

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) DOCKET NO.
) 04-00356
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ORDER DENYING PETITION

This matter came before Director Deborah Taylor Tate, Director Sara Kyle and Director Ron Jones of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this docket, at the regularly scheduled Authority Conference held on March 14, 2005 for consideration of the *Petition to Require Atmos Energy Corporation to Appear and Show Cause that Its Rates are Just and Reasonable and that It is Not Overearning and in Violation of Tennessee Law* ("Petition") filed by the Consumer Advocate and Protective Division of the Office of the Attorney General ("Consumer Advocate") on October 15, 2004.

BACKGROUND

Atmos Energy Corporation ("Atmos" or the "Company"), formerly United Cities Gas Company ("United Cities"), is a natural gas distribution company, organized and existing under the laws of the States of Illinois and Virginia, and operating in certain areas in the State of Tennessee. Since 1970, Atmos's rates have been subject to a Purchased Gas Adjustment ("PGA") provision in its rate tariff which permits the Company to track increases or decreases in its purchased gas costs. Atmos's rates are also subject to an experimental Weather Normalization Adjustment ("WNA")

which was approved pursuant to the generic proceeding before the Tennessee Public Service Commission ("TPSC") in Docket No. 91-01712.

On March 30, 1992, United Cities filed with the TPSC a petition in Docket No. 92-02987, requesting a rate increase of \$2.9 million. The request included an overall rate of return of 11.03%, with a 12.6% return on equity. Prior to the hearing on the petition the TPSC Staff and the Company reached a settlement agreement, which was approved in total by the TPSC at the hearing. The agreement called for a \$1.7 million rate increase and incorporated the overall rate of return and return on equity included in the Company's original filing.¹

On May 15, 1995, United Cities Gas filed with the TPSC a petition in Docket No. 95-02258, requesting a rate increase of \$3.9 million. At the hearing on October 11, 1995, the parties reached an agreement upon a revenue deficiency of \$2.2 million. The TPSC, upon consideration of all evidence, found the settlement as to revenue deficiency to be reasonable and approved the same.²

TRAVEL OF THE CASE

Consumer Advocate's *Petition*

In its *Petition*, filed in this docket on October 15, 2004, the Consumer Advocate states that it is authorized by Tenn. Code Ann. § 65-4-118(c)(2)(A)³ to initiate a contested case and participate or intervene in proceedings to represent the interest of Tennessee consumers. In support of its *Petition*, the Consumer Advocate alleges that the Form 3.03, filed on August 31, 2004 by Atmos, shows Atmos earning a 10.45% rate of return on its investments in Tennessee for the twelve-month period ending June 30, 2004.⁴ The *Petition* states that the current rate of return for Atmos in Tennessee "is not a fair rate of return because it grossly exceeds what the TRA has recently determined to be a fair

¹ See *In re Petition of United Cities Gas Company to Place Into Effect Revised Tariff Sheets*, TPSC Docket No. 92-02987, Order (September 21, 1992).

² See *In re Petition of United Cities Gas to Place Into Effect Revised Tariff Sheets*, TPSC Docket No. 95-02258, Order (November 20, 1995).

³ Tenn. Code Ann. § 65-4-118(c)(2)(A) was recodified as Tenn. Code Ann. § 65-4-118(b)(1) (2004).

⁴ *Petition to Require Atmos Energy Corporation to Appear and Show Cause that Its Rates are Just and Reasonable and that It Is Not Overearning in Violation of Tennessee Law*, p. 2 (October 15, 2004).

rate of return” in other cases before the TRA.⁵ As a result, the Consumer Advocate alleges that Atmos’s consumers in Tennessee are paying unjust and unreasonable rates for natural gas services. The Consumer Advocate filed the Affidavit of Stephen N. Brown, Ph.D. in support of these allegations.

Based on these allegations, the Consumer Advocate asked the Authority to initiate a show cause proceeding “to investigate the justness and reasonableness of Atmos’s rates and to issue a show cause order directing Atmos to show cause why its rates to Tennessee consumers should not be reduced to eliminate excessive earnings.”⁶

Atmos Response to Petition

On November 16, 2004, Atmos filed its response to the *Petition* stating that the Consumer Advocate does not allege that Atmos is earning more than the rate of return authorized by the TPSC in the Company’s last rate case. Atmos offered its August 31, 2004 Form 3.03 report as showing that Atmos’s earnings are below its authorized rate of return. Atmos states that any party desiring to challenge the reasonableness of rates approved by the TRA must make a *prima facie* showing and that the Consumer Advocate, in challenging the reasonableness of the TRA’s rate decisions, has not put forth material and substantial evidence to overcome the presumption that the rates approved by the TRA are valid. According to Atmos, the Consumer Advocate offers only that Atmos’s rate of return is unreasonable in light of the TRA’s recent decision in another TRA rate case proceeding, TRA Docket No. 04-00034.⁷ For these reasons and others set forth in the response, Atmos asserts that the Consumer Advocate *Petition* “falls far short of the showing required to initiate an investigation or a contested case to challenge the reasonableness of the TRA’s prior decisions setting Atmos’s rate of return.”⁸

⁵ *Id*

⁶ *Id* at 3

⁷ *Atmos Energy Corporation’s Response to Show Cause Petition*, p 14 (November 16, 2004) (“*Response*”) See also *In re Petition of Chattanooga Gas Company for Approval of Adjustments of Its Rates and Charges and Revised Tariff*, Docket No 04-00034, *Order* (October 20, 2004)

⁸ *Response* at 12

Consumer Advocate Reply to Atmos Response

In the *Reply of Consumer Advocate to Atmos Energy Corporation's Response to Petition* ("Reply") filed on January 14, 2005, the Consumer Advocate responds to Atmos's assertions that the *Petition* is legally insufficient, calling the argument unfair "because the Consumer Advocate has not had an opportunity to conduct discovery and make its full case."⁹ In addition to refuting the arguments of Atmos, the Consumer Advocate states that it is seeking the opening of an investigation.¹⁰

MARCH 14, 2005 AUTHORITY CONFERENCE

The panel assigned to this docket considered the *Petition* at the March 14, 2005 Authority Conference. The TRA's authority to commence show cause proceedings is derived from Tenn. Code Ann. § 65-2-106 which empowers the TRA "to issue orders on its own motion citing persons under its jurisdiction to appear before it and show cause why the authority should not take such action as the authority shall indicate in its show cause order appears justified by preliminary investigation made by the authority under the powers conferred upon it by law."¹¹ The burden of proof shifts to the party that has been directed to show cause upon the issuance of a show cause order.¹²

Tenn. Code Ann § 65-4-118(b)(1) provides that the Consumer Advocate may initiate a proceeding before the TRA in accordance with the Tennessee Uniform Administrative Procedures Act ("UAPA") and rules of the TRA. The Consumer Advocate's *Petition* clearly requests the TRA to initiate a proceeding for the purpose of issuing a show cause order. The Consumer Advocate bases its request on the assertion that the rate of return granted by the TPSC for Atmos in 1992 is

⁹ *Reply of Consumer Advocate to Atmos Energy Corporation's Response to Petition*, p 6 (January 14, 2005) ("Reply")

¹⁰ *Id* at 2.

¹¹ Tenn Code Ann § 65-2-106 (2004)

¹² Tenn Code Ann § 65-2-109(5) (2004)

now unreasonable in the context of today's environment, and that Atmos is earning well above a reasonable rate of return that would now be afforded by the TRA

Atmos's chief argument against the granting of the *Petition* is that the Consumer Advocate has failed to make a preliminary showing of excessive earnings on the part of Atmos and that the Consumer Advocate should not be permitted to shift the burden of proof to Atmos merely by asking for a show cause proceeding. Further, Atmos asserts that it is not earning more than its authorized return of 11.03% which is demonstrated by the *Petition* itself alleging that Atmos was earning a rate of return of 10.45% for the twelve month period ending June 20, 2004.

The Consumer Advocate's *Petition* does not fall within the ambit of Tenn. Code Ann. § 65-4-118(b)(1) because the *Petition* does not seek to "initiate" a proceeding before the Authority "in accordance with the [UAPA] and the rules of the authority." Instead, the *Petition* asks the TRA to initiate a show cause proceeding. Further, the Consumer Advocate's *Reply*, wherein it states that it has not "had the opportunity to conduct discovery and make its full case . . ."¹³ suggests that the *Petition* seeks the convening of a contested case in which Atmos would have the burden of proof and in which the Consumer Advocate could discover evidence to substantiate its allegations through proof.

Based upon the foregoing, a majority of the panel determined that the *Petition*, in its present form, was not the appropriate mechanism to commence a show cause proceeding and did not contain sufficient allegations upon which the TRA could issue a show cause order. The majority voted to deny the *Petition* and afford the Consumer Advocate an opportunity to file a complaint with the Authority setting forth sufficient allegations and thereby placing the burden of proof on the Consumer Advocate.

¹³ *Reply* at 6.

IT IS THEREFORE ORDERED THAT:

1. The *Petition to Require Atmos Energy Corporation to Appear and Show Cause that Its Rates are Just and Reasonable and that It is Not Overearning and in Violation of Tennessee Law*, as filed by the Consumer Advocate and Protective Division of the Office of the Attorney General, is denied.

2. The Consumer Advocate is permitted to file a legally sufficient complaint with the Authority addressing the same subject matter and establishing the burden of proof on the Consumer Advocate.


Deborah Taylor Tate, Director


Sara Kyle, Director

Ron Jones, Director¹⁴

¹⁴ Director Jones did not vote with the majority and filed a separate dissent